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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LELAND A. COOPER, *et al.*,
Petitioners,

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

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BRIEF *AMICI CURIAE* OF THE RETIRED OFFICERS ASSOCIATION AND TWENTY-TWO OTHER MILITARY AND VETERAN ORGANIZATIONS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether state taxation of the non-contributory retirement benefits paid to federal military retirees violates 4 U.S.C. § 111 when contributory and non-contributory retirement plan benefits paid to state and local employees are wholly exempt from state tax?

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BRIEF *AMICI CURIAE* OF THE RETIRED OFFICERS ASSOCIATION AND TWENTY-TWO OTHER MILITARY AND VETERAN ORGANIZATIONS IN SUPPORT OF PETITIONERS

The Retired Officers Association and twenty-two other military and veteran organizations file this brief *amici curiae* in support of petitioners and urge this Court to grant the petition for a writ of certiorari and reverse the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts.[1]

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[1] Counsel for petitioners and respondent have consented to the filing of this brief. Their letters of consent have been filed with the Clerk in accordance with Rule 37.2.

INTEREST OF *AMICI*

Amici are The Retired Officers Association (TROA) and twenty-two other military and veteran organizations.[2] TROA is a not for profit corporation that is dedicated to serving and protecting the interests of past and present active, reserve and retired commissioned and warrant officers in all seven of the uniformed services. Founded in 1929, TROA now has a membership of approximately 400,000 current and former officers and their survivors. TROA's mission is to support a strong national defense and to represent its members' interests before Congress, and, on rare occasions, before courts of the United States.

The twenty-two other military and veteran organizations have a combined membership of approximately one million current and former members of the uniformed services of the United States. Some of these organizations are focused on the interests of certain specializations within the uniformed service (*e.g.*, the Military Chaplains Association; the Association of Military Surgeons of the United States); some on particular branches of military service (*e.g.*, the Air Force Association; the Marine Corps League; the Fleet Reserve Association; U.S. Coast Guard Chief Petty Officers Association; U.S. Army Warrant Officers Association; Commissioned Officers Association of the U.S. Public Health Service). Some of these organizations are of relatively recent origin (*e.g.*, the Enlisted Association of the National Guard of the United States (founded in 1970); the National Order of the Battlefield Commissions (founded in 1978)); some have been championing the cause of the military services for a century or more (*e.g.*, the Jewish War Veterans of the USA (founded in 1896); the National Guard Association of the United States (founded in 1878)).

Old or new, large or small, each of the twenty-three military and veteran organizations that have joined in

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[2] A complete listing and description of the organizations joining in this brief appear as Appendix A to this brief.

this brief shares one common thread: they stand to assure that those men and women who have risked, and in some cases sacrificed, their lives in defense of the United States of America are treated with fairness and accorded the respect and dignity their service has earned. They join together in this brief because, as the decision of the Supreme Judicial Court of Massachusetts unfortunately demonstrates, state courts continue to violate the "Constitution's Supremacy Clause." *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1747 (1995).

Despite this Court's mandates in *Barker v. Kansas*, 503 U.S. 594 (1992), *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), and *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376 (1960), the Commonwealth of Massachusetts continues to refuse to give effect to this Court's decisions as the controlling statement of federal law. The resolution of the question presented in this case—whether a state court may ignore this Court's decisions establishing the rule of nondiscrimination under the constitutional doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. § 111, for retired military members—is vitally important to *amici*. If the decision below is permitted to stand, military retirees and, indeed, military members on active duty throughout the fifty states will be at risk that rights established by Congress may be arbitrarily abridged by any state court solely on the basis of its facile interpretation of federal law. *Amici* have supported the enactment of several measures by Congress which prohibit discrimination of the type upheld by the decision below. These enactments will soon become empty promises unless this Court makes clear that once it "has spoken, it is the duty of [all] courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1519 (1994). Thus, *amici* have a unique perspective on the question presented by this case as well as a vital interest in its proper resolution.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Judicial Court of Massachusetts presents a question of far-reaching importance: whether a state court is free to ignore the decisions of this Court construing the rule of nondiscrimination under the constitutional doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. § 111, for retired members of the armed forces? *Amici* respectfully submit that this Court should grant the petition in this case to correct the erroneous result of the court below on an issue involving the important concern of national defense. *See* U.S. Const. art. I, § 8, cls. 12, 13, 14. If there should be any doubt as to the need for certiorari, *amici* request that the Court seek the views of the Solicitor General of the United States because of the important federal interests implicated in the decision below.[3]

The decision of the Supreme Judicial Court of Massachusetts conflicts with the holdings of the Court in *Baker v. Kansas*, 503 U.S. 594 (1992); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), and *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376 (1960). In addition, it "conflicts with decisions of other state courts of last resort." *Baker*, 503 U.S. at 597 n.3. If permitted to stand, the result in this case will be an invitation to the states to eviscerate the holdings of the Court's decisions and render the doctrine of intergovernmental tax immunity meaningless.

In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), this Court construed the "plain language" of 4 U.S.C. § 111 and concluded that the "statute leaves no room for doubt" that federal retirement benefits "are sub-

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[3] In *Filios v. Commissioner*, No. 93-1145, the Solicitor General urged the Court to grant the petition if it were timely. Upon subsequent briefing, at the request of the Court, it appears that the Court concluded that the *Filios* peition was untimely. This case presents the same important federal question that was never reached in *Filios*.

ject to § 111." *Id.* at 808. In resolving the question of the validity of the Michigan Income Tax Act, the Court held that "the relevant inquiry is whether the inconsistent tax treatment is *directly related to*, and *justified* by, 'significant differences between the two classes.'" *Id.* at 816 (emphasis added) (citation omitted). However, in resolving the issue of whether Massachusetts may discriminate in favor of its own retirees and against military retirees, the court below ignored the nondiscrimination principle of *Davis*. *See Cooper v. Commissioner of Revenue*, 421 Mass. 557, 562, 658 N.E.2d 963 (1995), *petition for cert. filed*, 64 U.S.L.W. 3669 (U.S. Mar. 25, 1996) (No. 95-1542).

As to military retirees, Massachusetts' discriminatory scheme in operative effective is indistinguishable from the scheme addressed by this Court in *Barker v. Kansas*, 503 U.S. 594 (1992). As in Kansas, Massachusetts "taxes the benefits received from the United States by military retirees but does not tax the benefits received by retired state and local government employees." *Id.* at 596.[4] However, neither the lower courts' opinion nor the position of the State demonstrates how the differential treatment of military retirees—both facially and in effect—is "based on" the alleged differences between the two classes. *See Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 384 (1960); *Davis*, 489 U.S. at 816-17. The only distinguishing factor set forth in Massachusetts' ex-

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[4] Similar to Kansas, Massachusetts has a "piggyback" system of taxation which adopts federal gross income as its starting point. General Laws C.62, § 2. Pension income is included in federal gross income. 26 U.S.C. §§ 61(a)(9) and (11). However, the State wholly exempts from this tax any "[i]ncome from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed." General Laws C.62, § 2(a)(2)(E). Payments received by persons who participated in the pre-1938 noncontributory retirement system for state and local police and firemen are also exempt from the Massachusetts income tax. 1973 Mass. Acts, ch. 876.

emption provisions is the source of the compensation. There is no evidence of any kind which establishes that the Massachusetts legislature intended to single out military retired pay for discrimination because of any actual or perceived differences from other forms of retirement income. The court below based its decision *solely* on the *post hoc* rationalization of the respondent. *See* T.I.R. 1992-3, App. D. 15a-18a. However, such a rationalization is legally insufficient to permit a state to discriminate against military retired pay.

The court below held that Massachusetts' discriminatory scheme did not violate 4 U.S.C. § 111 because of the noncontributory nature of the military retirement system.[5] In so holding, it simply adopted the position of the respondent that the discriminatory tax treatment of retirement benefits was dependent on "whether the retirement fund is a 'contributory fund to which the employee has contributed.'" *Cooper*, 421 Mass. at 559 (citations omitted). This conclusion is "unpersuasive." *Barker*, 503 U.S. at 603.

Under the current, contributory retirement system for state and local employees in Massachusetts, 90% of the retirement benefits are funded exclusively from government employer contributions. *See, e.g., Filios v. Commissioner of Revenue*, 415 Mass. 806, 811, 615 N.E.2d 933 (1993), *cert. denied*, 114 S. Ct. 1538 (1994); Pet. at 12.[6] Beginning in 1987, the so-called employee's contribution of the other 10%, representing the employee's "annuity savings fund," is paid as well by the state and local government employer units. General Laws C.32,

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[5] As the Solicitor General poignantly noted in *Barker*, Congress' decision to fund military retired pay out of general revenues rather than annual contributions "is no concern of state tax policy . . . ." *See Brief* For The United States As Amicus Curiae In Support Of Petitioners, at 23 n.34, *Barker v. Kansas*, No. 91-611 (1992).

[6] The other exempt state pension plan is noncontributory. *See* n.4, *supra*.

§ 22(10). *See also* Pet. at 11-12. Yet, the exemption provided state and local retirees is unlimited.

In addition, the court's conclusion that all members of the favored state class are "required to make regular, State-taxed, contributions" is erroneous. *Cooper*, 421 Mass. at 560. Under the discriminatory scheme in issue, many members of the favored state and local class of retirees were never subject to tax at all at the time their contributions were made. *See, e.g.*, Letter Ruling 1987-8, App. C, 11a-14a.[7] Similarly, many of the other remaining members of the favored states and local class have likewise never been subject to tax on their contributions. Massachusetts provides a current deduction for tax purposes of $2,000 for *employee* contributions to contributory pension plans. *See* General Laws C.62, § 3(B)(a)(4).[8] The balance of the favored state and local class has similarly paid little or no tax on their contributions.

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[7] In addition, Massachusetts law, in the first instance, provides unlimited protection to prevent the imposition of tax upon retirement benefits attributable to *employee* contributions that have been taxed at the time of contribution. For example, the instructions to the 1993 Massachusetts Resident Income Tax Form 1 provide at 8 that pensioners are to "[s]ubtract from [their taxable] income the amount of [their] contributions which were previously taxed by Massachusetts until the total of [their] taxed contributions are received." App. E, 19a. Thus, it is clear that the state's proffered rationale for the source based discrimination at issue in this case does not exist in fact.

[8] The statute provides in relevant part:

> (a) There shall be deducted from the Part B adjusted gross income in determining the Part B taxable income:
>
> * * *
>
> (4) All sums *deducted* from wages as *contributions* to any annuity, pension, endowment or retirement fund of the United States government, the commonwealth or any political subdivision thereof, provided, that the deduction for such contributions and the deductions otherwise allowable under subparagraph (3) hereof attributable to any one taxpayer shall not in the aggregate exceed two thousand dollars . . . .

to the plan by virtue of this same provision. *Id.* And *all* members of the favored state and local class enjoy a *full* exemption from tax on *all* of their retirement benefits.

Morever, if there were any doubt as to the source based discrimination of Massachusetts' scheme, it is readily demonstrated by the scheme's operative effect as to retirees of states other than Massachusetts. Retirees of other states' public employee retirement systems are entitled to the discriminatory exemption, not based on whether their contributions were previously taxed by either Massachusetts or their former state, but *solely* on the source of the payor state. If the payor state exempts Massachusetts' public employee retirement income from taxation, then the payor state's public employee retirement income is exempt in Massachusetts. *See* Technical Information Release 1995-9, App. B, 7a-10a. On the other hand, if the other state does not exempt Massachusetts public employee retirement income, then the other state's public employee retirement income is taxed in Massachusetts, irrespective of whether there has been prior taxation of the *employee* contribution. *Id.*

The decision below is in irreconcilable conflict with the Court's decision in *Davis*. Ninety percent of Massachusetts retirement benefits are funded exclusively through government *employer* contributions and the earnings on those *employer* contributions. *See, e.g.*, Pet. at 11-13. Yet, Massachusetts does not tax, at *any* time, these *employer* contributions and earnings on *employer* contributions. However, the court below justified the State's taxation on the *full* measure of military retired pay on the basis that *part* of the benefits received by state and local employees—the sum attributable to *employee* contributions—had been previously taxed. *Cooper*, 421 Mass. at 557.[9] *See also* Technical Information Release 1992-3, App. D, 17a.

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[9] Of course, as demonstrated above, the court's conclusion that *employee* contributions have been *fully* taxed at the time of con-

Examining Massachusetts' scheme, it is clear that the "State's articulated rationale is not in fact the basis for the disparate treatment, but only a cloak for discrimination against federally funded benefits." *Barker*, 503 U.S. at 604-05 (1992) (citation omitted). As this Court recognized in *Davis*, a "tax exemption truly intended to account for differences in [the taxation for the funding of] retirement benefits would not discriminate on the basis of the source of those benefits, as [Massachusetts'] statute does; rather it would discriminate on the basis of the amount of benefit received by individual retirees [which were previously taxed]." *Davis*, 489 U.S. at 817. Accordingly, for purposes of 4 U.S.C. § 111, it is obvious that Massachusetts' proffered rationale fails "because an evenhanded application of the rationale would have resulted in inclusion of [all state retirees] in the disfavored class." *Id.*

Under the doctrine of intergovernmental tax immunity, "the State [must] treat those who deal with the Government as well as it treats those with whom it deals itself." *Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 385 (1960). Consistent with this doctrine, 4 U.S.C. § 111 prohibits the discriminatory state taxation of "salaries, retirement benefits, and other forms of compensation . . . on account of the source of the compensation." *Davis*, 489 U.S. at 810. Nothing in the doctrine of intergovernmental tax immunity or the statute differentiates between military retirees and other retired employees. *Barker v. Kansas*, 503 U.S. 594 (1992).

As this Court recognized in *Davis*, "[t]he danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it." *Davis*, 489 U.S. at 815 n.4. In the instant case, the court below acted impermissibly when it failed to scru-

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tribution is plainly erroneous. *See, e.g.*, Letter Ruling 1978-8, *supra*; General Laws C.62, § 8(B)(a)(4), *supra*, n.8.

tinize the respondent's *post hoc* rationalization for the discrimination.

Because of the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers, such as the petitioners, are relegated exclusively to state courts to press their claims for relief. But it is state courts that have demonstrated the greatest difficulty in recognizing this Court's decisions as the "controlling statement of federal law." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993). This Court is the only federal court that can hear the retirees' claims. Review by this Court is thus necessary to assure a correct and evenhanded application of this Court's decisions. Absent review by this Court, "[t]he State too easily avoids its responsibilities . . . [for its] noncompliance with federal law." *Green v. Mansour*, 474 U.S. 64, 81 (1985) (Blackmun, J., dissenting).

CONCLUSION

Contrary to the decisions of this Court in *Phillips*, *Davis*, and *Barker*, the court below utilized a "cloak for discrimination," *Barker*, 503 U.S. at 604, to justify a result which violates the express will of Congress. *Amici* respectfully urge that the petition for a writ of certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts should be granted and that the decision below should be reversed.

Respectfully submitted,

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April 23, 1996

APPENDICES

APPENDIX A

The following organizations join in this brief in support of the petition for a writ of certiorari to the Supreme Judicial Court of Massachusetts:

Air Force Association (AFA)

Founded in 1946. Approximately 200,000 members. Membership in AFA is open to anyone who serves or has served in the U.S. Military. Other American citizens may affiliate as patrons. Mission is to provide public understanding of aerospace power, need to support a strong national defense and to represent needs of men and women who serve and have served in USAF.

Army Aviation Association of America (AAAA)

Founded in 1957. Approximately 16,000 members. Membership in AAAA is open to all persons who desire to support the furtherance of U.S. Army Aviation or its allied pursuits.

Association of Military Surgeons of the United States (AMSUS)

Chartered by Congress in 1903. Approximately 13,000 members. Membership is open to past and present commissioned officers or GS-9 and above civilians in the Federal Health Agencies including USA, USAR, USN, USNR, USAF, USAFR, ARNG, ANG, USPHS, USCG and VA; officers of military medical services of other nations; and past and present medical consultants to the chiefs of the federal medical services. Mission is dedicated to the advancement of all aspects of health care within the Federal Health Agencies.

Association of the U.S. Army (AUSA)

Founded in 1950. Approximately 115,000 individual and 204 industrial members. Membership is open to all

active, reserve and civilian personnel in the Army, and any person subscribing to the association's bylaws. The purpose of the organization is to foster public understanding and support of the Army and the people who serve in it.

Commissioned Officers Association of the U.S. Public Health Service (COA)

Founded 1937. Approximately 6,900 members. Membership is open to active duty, retired, inactive reserve and former commissioned officers of the U.S. Public Health Service. Mission is to protect the interests and welfare of commissioned officers of the PHS.

CW & WO Assn. US Coast Guard

Founded in 1929. Approximately 3,300 members. Membership is open to active duty, reserve and retired Coast Guard warrant and chief warrant officers. The association's purpose is to advance members' professional abilities.

Enlisted Association of the National Guard of the U.S. (EANGUS)

Founded 1970. Approximately 60,000 members. Membership is open to enlisted members of the National Guard through state associations and associate membership is open to all individuals through state associations. The purpose of the association is to promote and maintain adequate national security; and to foster the status, welfare and professionalism of enlisted members of the National Guard.

Fleet Reserve Association (FRA)

Chartered November 11, 1924. Over 160,000 members plus 20,000 member Ladies Auxiliary. Membership is open to active duty, drilling reserve, and retired enlisted personnel and commissioned officers with prior enlisted

service in the Navy, Marine Corps and Coast Guard. Mission is to represent its members on military compensation, benefits and entitlements legislation before the Congress.

Jewish War Veterans of the USA

Founded in 1896. Approximately 100,000 members. Membership is open to veterans of wartime service of the Jewish faith. The organization's mission is service to veterans, Americanism, and to provide a voice on the Hill for veterans' legislation and benefits.

Marine Corps League (MCL)

Founded in 1923. Approximately 45,000 members. Membership is open to those who served in the Marine Corps. The organization's mission is to preserve the traditions, to promote the interests of the Marine Corps, to voluntarily aid and render assistance to all Marines and former Marines, as well as to their widows and orphans.

Marine Corps Reserve Officers Association (MCROA)

Founded in 1928. Approximately 5,500 members. Membership is open to all Marine officers and officers of other U.S. services who served with Marines. The association's mission is to support and strengthen the Marine Corps, its reserve and reserve officers.

Military Chaplains Association of the USA (MCA)

Founded in 1925 and chartered by Congress in 1950. Approximately 1,600 members. Membership is open to all chaplains of the Army, Navy, Air Force, VA and Civil Air Patrol, active duty, reserve, retired and former. The organization's mission is to safeguard and strengthen the forces of faith and morality of our nation; to perpetuate and to deepen the bonds of understanding and friendship in our military services; to preserve spiritual influence and interest in all members and veterans of the armed forces;

to uphold the Constitution of the United States; and to promote justice, peace and goodwill.

National Guard Association of the United States (NGAUS)

Founded in 1878. Approximately 58,000 members. Membership is open to all present and former officers of the Army and Air National Guard, corporate and individual associate membership. The association's mission is to improve the readiness of the National Guard and to provide personnel benefits and entitlements for the half million members of the National Guard.

National Military Family Association (NMFA)

Founded in 1969. Approximately 10,000 family members. Membership is open to active duty, retired and reserve component members of the seven uniformed services and their family members and survivors. NMFA's mission is to serve military and other uniformed service families through education, information and advocacy.

National Order of The Battlefield Commissions (NOBC)

Founded 1978. Approximately 1,000 members. Membership is open to any individual of any service who has been Commissioned in the Armed Forces of the United States as a result of combat action. Mission is to support a strong and responsive national defense by supporting those Americans that follow our flag.

Naval Enlisted Reserve Association (NERA)

Founded in 1957. Approximately 15,000 members. Membership in NERA is open to active and retired enlisted reservists in the Coast Guard, Marine Corps and Navy and to all other interested citizens. NERA is dedicated to promoting and maintaining career service in the Sea Service Reserve.

Navy League of the United States (NLUS)

Founded in 1902. Approximately 68,000 members. Membership is open to civilians, military reservists and retirees. The League's mission is to maintain a strong U.S. maritime posture through support of the Navy, Marine Corps, Coast Guard and Merchant Marine.

Reserve Officers Association (ROA)

Organized in 1922, and chartered by Congress in June 1950. Approximately 100,000 members. Originally, the Reserve Officers Association consisted solely of Army officers, Reserve officers, National Guard officers, and retired officers. Following World War II, the Reserve Officers Association expanded its membership to all services.

The Retired Enlisted Association (TREA)

Founded in 1963 and chartered by Congress. Approximately 77,000 members. Membership open to enlisted retirees from all branches of the service, their surviving spouses and active duty members with over 20 years of service. Mission is to protect earned benefits of retired and career enlisted and their families.

The Retired Officers Association (TROA)

Founded in 1929. Approximately 400,000 members. Membership in TROA is open to all past and present, active, reserve and retired commissioned and warrant officers in any of the seven uniformed services and their survivors. TROA's mission is to support a strong national defense and to represent its members' interests before Congress.

United Armed Forces Association (UAFA)

Founded in 1987. Approximately 18,000 members. Membership is open to E-1 through O-10, Active Duty,

Retired, Reserve, National Guard, Veterans of all five uniformed military services. Mission is to represent the members of the Armed Forces before Congress on legislative matter affecting them.

U.S. Army Warrant Officers Association (USAWO)

Founded 1973. Approximately 5,000 members. Membership is open to active duty, National Guard, reserve and retired Army warrant officers. Mission is to recommend improvement of the Army and to promote technical and professional information among warrant officers.

U.S. Coast Guard Chief Petty Officers Association (CPOA)

Founded in 1969. Its 10,000 members are active, retired, and reserve Coast Guard chief petty officers. The mission of the Association is to promote the welfare of chief petty officers, to promote and protect the rights and benefits of all armed forces personnel and aid in Coast Guard recruiting.

APPENDIX B

MASSACHUSETTS TECHNICAL INFORMATION RELEASE 95-9 JANUARY 31, 1996

Income Taxation of Contributory Public Employee Pensions of Other States

Introduction

This Technical Information Release announces the Department of Revenue's decision to acquiesce in the Appellate Tax Board's ruling in *Pariser v. Commissioner of Revenue*, A.T.B. Docket No. 215394 (March 1995) to the extent of the facts in the case.

Department's Position Prior to *Pariser*

Massachusetts General Laws chapter 62, section 3(B)(a)(4) provides a deduction from Massachusetts adjusted gross income of:

> any income from a contributory annuity, pension, endowment or retirement fund of any other state or any political subdivision thereof, provided that income from any such similar fund established under the laws of the commonwealth is not subject to taxation in such other state or political subdivision.

Id. Thus, in general, a deduction is available to a Massachusetts resident who receives a contributory public pension from another state if the other state grants reciprocal treatment to retirees from Massachusetts. Before *Pariser*, the Department concluded that unless another state provides a blanket exemption for all Massachusetts contributory public employee pension income, there is no reciprocity, and income from a contributory public employee retirement plan of that state received by a Massachusetts resident may not be deducted from Massachusetts adjusted gross income. See Letter Ruling 81-91 and 85-12 which discussed income received from a New York State contributory public employee pension fund.

Section 617(c)(3-a) of the New York State Personal Income Tax Law permits New York residents to deduct from gross income:

> Pensions and annuities received by an individual who has attained the age of fifty-nine and one-half, . . . to the extent includible in gross income for federal income tax purposes, but not in excess of twenty thousand dollars.

Id. Under this provision, New York still taxes income from Massachusetts contributory public employee retirement plans when the taxpayer is younger than 59 and one-half years old or to the extent pension income exceeds $20,000. In Letter Rulings 81-91 and 85-12 the Department held that because section 617(c)(3-a) of the New York State Personal Income Tax Law did not provide a blanket exemption for all Massachusetts contributory public employee pension income, a Massachusetts resident who receives income from a New York State contributory public employee pension fund was not entitled to a deduction pursuant to M.G.L. c. 62, § 3(B)(a)(4) for that income.

ATB Decision in *Pariser*

In *Pariser*, the taxpayer, a Massachusetts resident appealed the Department's denial of his request for an abatement of tax paid on $11,322.00 of income received from a New York State contributory pension. The Appellate Tax Board ruled that M.G.L. c. 52, § 3(B)(a)(4) does not require that another state provide a blanket exemption for all Massachusetts pension income. The Board stated that the focus was on whether the taxpayer would have been taxed in the payor state if he were a resident of that state and the income had been paid by a Massachusetts pension, if not, his pension income from the payor state is not taxable in Massachusetts. Since Mr. Pariser was over 59½ years of age and the pension income was less than $20,000, he would not be taxed in

New York on pension income paid by a similar Massachusetts pension fund. Thus, his pension income from New York was not taxable in Massachusetts.

Department's Position After *Pariser*

The Department of Revenue acquiesces in the ATB's decision in *Pariser* to the extent of the facts in the case. The Department will no longer require that the laws of another state provide a blanket exemption for all Massachusetts pension income before recognizing such laws to be reciprocal. A Massachusetts resident will be allowed a deduction for income received from a contributory annuity, pension, endowment or retirement fund of another state or its political subdivisions if:

(1) that other state has a specific income exclusion for pension income which applies to Massachusetts state or local contributory public employee pension plans; or

(2) that other state has a specific deduction or exemption for pension income which applies to Massachusetts state or local contributory public employee pension plans; or

(3) that other state has no income tax.

The amount of the deduction allowed pursuant to M.G.L. c. 62, § 3(B)(a)(4) for income received by a Massachusetts resident from a contributory public employee annuity, pension, endowment or retirement fund of another state will equal the amount of the specific pension exclusion, deduction, or exemption that could be claimed by the taxpayer under the laws of the other state if the taxpayer were a resident of the other state and received the income from a Massachusetts state or local contributory pension. In the case of a state that has no income tax, all income from qualifying pensions of the other state or its subdivisions may be deducted under M.G.L. c. 62, § 3(B)(a)(4).

The following examples illustrate the rules announced in this TIR:

Example 1: A Massachusetts resident who is 62 years old receives $25,000 of pension income from a New York State contributory public employee pension fund. As set out above, New York allows a deduction for pension income provided the recipient is 59½ years old or older and the deduction is not in excess of $20,000. The Massachusetts resident is allowed a deduction in the amount of $20,000 for the New York Pension income.

Example 2: A Massachusetts resident who is 55 years old receives $25,000 of pension income from a New York State contributory public employee pension fund. The taxpayer, who is not 59½ years old or older, is not allowed a deduction for any of the New York pension income.

Example 3: State A has a personal income tax with a standard personal exemption of $10,000 applicable to any type of income, but no specific exclusion, deduction or exemption related to pension income. A Massachusetts resident receives $20,000 in gross income, including $15,000 in pension income from a contributory public employee pension fund in State A. No part of the $15,000 of pension income is deductible under M.G.L. c. 62, § 3(B)(a)(4) because the $10,000 personal exemption in State A is not specifically related to pension income.

This TIR revokes Letter Rulings 81-91 and 85-12 and Technical Information Releases 80-4 and 89-10.

APPENDIX C

Massachusetts Letter Ruling 1987-8
December 1, 1987

You have requested a letter ruling on behalf of the * * * (Authority), a political subdivision of the Commonwealth, on the Massachusetts tax consequences to Authority employees of a recent change to the Authority's retirement plan. The facts as you have explained them to us are as follows.

Facts

The Authority retirement plan requires Authority employees to contribute 4% of their salaries annually to the retirement fund. Contributions are deducted from employees' salaries and paid directly into the fund. Generally, the Internal Revenue Code treats such contributions as having been made by the employee, which meant that they were part of each Authority employee's federal gross income for the year.

In February 1988, however, the Authority amended its plan by adopting the "pick-up" provision of Code § 414 (h)(2). In doing so, the Authority stated that the picked-up contributions "shall, as permitted by IRC Section 414(h)(2), be considered employee contributions for all purposes of the Fund and included as employee compensation as defined by the Plan (Pension Agreement, Art. V, § 3(c)). Code § 414(h)(2) provides that

> in the case of any plan established by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, where the contributions of employing units are designated as employee contributions but where any employing unit picks up the contributions, the contributions so picked up shall be treated as employer contributions.

The effect of Code § 414(h)(2) is to exclude the employee pension contributions that the Authority has "picked up" from the employees' federal gross income and from withholding requirements. *See* Rev. Rul. 77-462. When an employee receives amounts from the fund upon retirement, however, those amounts are taxable for federal income tax purposes. *See id.*

Discussion

The change to the Authority's retirement fund raises two Massachusetts tax questions: (1) how the picked-up contributions will be treated under G. L. c. 62; and (2) how payments to a retiree will be treated under G. L. c. 62. We conclude that: (1) an Authority employee is not required to include the retirement fund contributions picked up by the Authority as part of Massachusetts gross income; and (2) a retired Authority employee may exclude from Massachusetts gross income amounts received from the retirement fund.

A. *Contribution to the Fund*

The Massachusetts personal income tax statute, G. L. c. 62, imposes a tax on a taxpayer's Massachusetts gross income, which, the statute specifies, is the taxpayer's federal gross income, with certain items added thereto and other items excluded therefrom not here relevant. G. L. c. 62, § 2(a). Under Code § 414(h)(2), an Authority employee excludes retirement fund contributions picked up by the Authority from federal gross income. As a result, the employee will also exclude those contributions for Massachusetts tax purposes, unless one of the provisions of G. L. c. 62, § 2(a), requires the employees to add such contributions to federal gross income. There is no such requirement in G. L. c. 62. The picked-up retirement fund contributions are therefore not included in an employee's Massachusetts gross income. (Since the contributions are not included in gross income, employees

may not deduct them from income under G. L. c. 62, § 3(B)(a)(4).)

B. *Benefits Received from the Fund*

On the other hand, amounts received by a retired Authority employee from the retirement fund are included in federal gross income. Code § 61(a)(11). They will therefore also be taxable for Massachusetts purposes unless a specific provision of G. L. c. 62 excludes them. Section 2(a)(2)(E) of G. L. c. 62 provides that a taxpayer may exclude from Massachusetts gross income "[i]ncome from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed." See also G. L. c. 62, § 3(B)(a)(4). We conclude that the Authority's retirement fund is one "to which the employee has contributed" and, as a result, that the benefits Authority employees will receive from the fund when they retire are exempt from Massachusetts taxation.

Analyses of both the practical aspects of the plan as amended and the statutory language of the applicable provisions of G. L. c. 62 support this conclusion. First, the change to the Authority's retirement plan alters the substance of the pension arrangement with the Authority's employee in only one way; now, the contribution each employee must make to the fund is not taxable to the employee. The amount of the contribution, representing a percentage of the employee's total salary, remains the same as before the Authority amended its plan. The pension benefits the employee will be entitled to receive, based on the employee's salary history over the course of his or her employment, remain the same. Moreover, the amount an employee must contribute under the Federal Insurance Contributions Act (Code § 3101 *et seq.*), also based on the employee's total salary, remains the same. The retirement fund contributions thus may be said to come from the employees despite the fact that

the contributions are not taxed to the employees as a result of Code § 414(h)(2). Second, there is no requirement in G. L. c. 62 that the exclusion of retirement benefits from taxable income under G. L. c. 62, § 2(a)(2)(E) and § 3(B)(a)(4) apply only to retirement plans that were subject to the $2,000 limit on non-taxable contributions under G. L. c. 62, § 3(B)(a)(4).

APPENDIX D

Massachusetts Technical Information Release 1992-3
April 28, 1992

I. Summary

This Technical Information Release (TIR) explains the Massachusetts income tax treatment of U.S. military retirement benefits in light of the U.S. Supreme Court decision in *Barker v. Kansas,* 60 U.S.L.W. 4322 (April 21, 1992). The TIR concludes that the *Barker* decision does not negate the validity of the distinction between contributory and non-contributory public retirement plans under G.L. c. 62, § 2(a)(2)(E). Therefore, payments from non-contributory public retirement plans, generally including military retirement benefits, remain subject to the Massachusetts personal income tax.

II. Discussion

A. Federal Law

Under the Public Salary Act of 1939, 4 U.S.C. § 111, the United States permits individual states to tax the pay of federal officers and employees, provided that the tax does not discriminate against the officers or employees because of the source of their pay.[1] The Supreme Court has held that preferential tax treatment of retirement income paid to former state and local government employees, based on the source of that income, violates 4 U.S.C. § 111 when it is not extended to federal retirees.

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[1] 4 U.S.C. § 111 provides as follows: The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

Davis v. Michigan Department of the Treasury, 489 U.S. 803 (1989).

Recently, the U.S. Supreme Court in *Barker v. Kansas,* 60 U.S.L.W. 4322 (April 21, 1992) decided that the state of Kansas discriminated against federal employees in violation of 4 U.S.C. § 111 when it taxed the retirement benefits of military retirees while exempting from tax the retirement benefits of former state employees. Because military "retirees" remain members of the U.S. armed forces and are subject to military justice, to restrictions on civilian employment, and to recall for active service, Kansas had attempted to justify its disparate tax treatment of payments to military retirees and state retirees by describing payments to military retirees as current reduced payments for current services, as opposed to the deferred compensation received by former state employees for past services. The Supreme Court rejected this distinction because payments to a military retiree are based on the retiree's rank and length of service and, in fact, resemble deferred compensation for services previously provided. The Court concluded that Kansas had violated 4 U.S.C. § 111 because its inconsistent tax treatment of state and federal retirees was not "directly related to, and justified by, significant differences between the two classes" of retirees. *Barker,* 60 U.S.L.W. 4322 at ——.

B. Massachusetts Statutes

Massachusetts generally imposes an income tax on the Massachusetts gross income of residents with certain deductions and exclusions, G.L. c. 62. Massachusetts gross income is defined as federal gross income with Massachusetts modifications. G.L. c. 62, § 2. One of these modifications excludes "[i]ncome from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any

political subdivision thereof, to which the employee has contributed," G.L. c. 62, § 2(a)(2)(E). See also G.L. c. 62, § 3(b)(a)(4). Under the terms of this statute, either state or federal pension payments are exempt from Massachusetts income tax if the pension funds are contributory. Military retirement benefits generally are subject to Massachusetts income tax because the military retirement system is not a contributory retirement plan. See Technical Information Release 89-6; Letter Ruling 89-1.

C. Barker Decision Does Not Invalidate Massachusetts Law.

In *Barker,* the Supreme Court has recognized that state taxing systems do not necessarily violate 4 U.S.C. § 111 merely because they impose tax on the income of federal employees while exempting from tax the income of state employees. Rather, the Court stated that "we evaluate a state tax that is allegd to discriminate against federal employees in favor of state employees by inquiring 'whether the inconsistent tax treatment is directly related to, and justified by, significant differences between the two classes.'" *Barker,* 60 U.S.L.W. 4322, at ——. Thus, significant differences between classes of federal and state employees may justify different tax treatment of the incomes of those classes of employees.

Massachusetts law does not violate 4 U.S.C. § 111 because it does not discriminate against federal retirees on the basis of the source of their pay. See TIR 89-6 (responding to the *Davis* decision). The significant distinctions between the structures of contributory retirement plans and non-contributory plans directly relate to and justify the difference in tax treatment of distributions from these plans. A contributory pension is one in which amounts contributed to the plan are includible in the Massachusetts gross income of the employee (or would be included in the Massachusetts gross income of the

employee if the employee were a Massachusetts resident). Under a non-contributory plan, amounts contributed on behalf of an employee are not included in the gross income of the employee and are therefore not subject to tax at the time of contribution. Thus, taxing distributions from contributory plans can lead to double taxation, while tax ing distributions from non-contributory plans will not.

The Supreme Court in *Barker* specifically refrained from invalidating different tax treatment of payments from contributory and non-contributory plans. *Barker*, 60 U.S.L.W. 4322, at —— n. 5. Consequently, the *Barker* decision does not alter the non-discriminatory distinction between payments from these plans currently found in Massachusetts law.

APPENDIX E

EXCERPT FROM 1993 MASSACHUSETTS RESIDENT INCOME TAX FORM 1— ALL SCHEDULES AND INSTRUCTIONS

Item 3

Taxable Pensions and Annuities

Income from most private pensions or annuity plans is taxable in Massachusetts. Certain government pensions, however, are exempt under Massachusetts law. In general, exempt pensions include contributory pensions from the U.S. Government or the Commonwealth of Massachusetts and its political subdivisions. Noncontributory military pensions are taxable in Massachusetts. The following section describes some specific pensions which are exempt. If your pension is exempt, enter "0" in Item 3 and note the source of the pension in the margin. For more information, refer to Technical Information Release (TIR) 89-6 or 92-3.

If your pension is not exempt, you should generally enter in Item 3 the taxable amount reported on your U.S. Form 1040A, line 11b, or U.S. Form 1040, line 17b. In some cases, however, Massachusetts law requires an adjustment to the federal amount. Distributions from annuity, stock bonus, pension, profit-sharing or deferred payment plans or contracts described in Sections 403(b) and 404 of the U.S. IRC must be adjusted to account for your contributions that have been previously taxed. Subtract from such income (as reported on your U.S. Form 1040A, line 11a, or U.S. Form 1040, line 17a) the amount of your contributions which were previously taxed by Massachusetts until the total of your taxed contributions is received. If your pension falls into this category, enter the adjusted amount in Item 3 and explain briefly (in an attached statement) why this amount is different than the amount

reported on your U.S. return. If you are receiving distributions from an IRA or Keogh plan, do not report the income here; instead, please refer to the instructions for Item 10.